2009

A-T Asphalt Paving, Inc. v. Braffits Creek Estates, Inc.; Omnia Development, Inc., Crescent Properties, LLC; ANB Financial N.A., Kennedy Funding, Inc.; R and W Excavating, Inc.; Schwab Sales, LLC : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

A-T ASPHALT PAVING, INC., a Utah corporation, Plaintiff and Appellee, v. BRAFFITS CREEK ESTATES, INC., a Utah limited liability corporation; OMNIA DEVELOPMENT, INC., a Utah corporation; CRESCENT PROPERTIES, LLC, a Nevada limited liability company; ANB FINANCIAL N.A., an Arkansas National Association; KENNEDY FUNDING, INC., a New Jersey corporation; R&W EXCAVATING, INC., a Utah corporation; SCHWAB SALES, LLC, an Arizona limited liability company; and John Does 1-5, Defendant and Appellant.	APPELLANT'S BRIEF Appeal No. 20090790 Civil No. 080500072

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code section 78A-3-102(3)(j), as Appellant Kennedy Funding, Inc's ("Appellant") petition for interlocutory appeal was granted on December 8, 2009. *See* Utah Code Ann. § 78A-3-102(3)(j); Utah R. App. P. 5.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred when it determined that, pursuant to Utah Code Title 38, Chapter 1, a contractor can enforce a lien against private abutting lots for paving work that it performed on dedicated public roads. Requiring interpretation of the mechanic's lien statutes, specifically Utah Code sections 38-1-1 and -3, this is an issue of law, reviewed for correctness. *See Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Development Co.*, 784 P.2d 1217, 1220 (Utah Ct. App. 1989) ("The construction of a statute is a question of law and thus we review the trial court's conclusion under a correction of error standard."); *Foothill Park, LC v. Judston, Inc.*, 2008 UT App 113, ¶4, 182 P.3d 924 ("Inasmuch as the issues before us are limited to questions of law, namely, questions of statutory interpretation, no deference need be given the trial court's conclusions."). This issue necessarily requires this Court to determine whether the district

court incorrectly denied Appellant's motion for summary judgment while granting Appellee AT Asphalt Paving, Inc.'s motion for partial summary judgment, an issue of law that is reviewed for correctness. *See Jackson v. Mateus*, 2003 UT 18, ¶ 6, 70 P.3d 78.

2. Whether the district court erred when it incorrectly determined two issues of "undisputed fact," and then erroneously relied upon those and upon this Court's holding in *First of Denver Mortgage Investors v. Zundel & Associates*, 600 P.2d 521 (Utah 1979), to conclude that Appellee could lien abutting lots. The district court's errors present issues of law that are reviewed for correctness. *See Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2007 UT App 407, ¶ 31, 175 P.3d 572; *Jackson v. Mateus*, 2003 UT 18, ¶ 6, 70 P.3d 78.

These issues were preserved in the district court pursuant to Appellant's motion for summary judgment and its supporting memorandum, and in its memorandum opposing Appellee's cross-motion for partial summary judgment. *See* R.492-555; 713-64.

DETERMINATIVE STATUTORY PROVISIONS

Statutes that may be determinative of this appeal are Utah Code sections 38-1-1 and -3. Each of these statutes is provided in its entirety in the Addendum to this brief.

STATEMENT OF THE CASE

The underlying case is a mechanics lien foreclosure action. Appellee seeks to foreclose its mechanics lien against 240 lots located in the 3200 Subdivision, Phase 2, located in Iron County. In the process of the foreclosure, Appellee seeks a declaration that Appellant's interest in the lots is inferior to the mechanics lien.

In September 1985, the plat for 3200 Subdivision Phase 2 was acknowledged and recorded with the Iron County Recorder. Twelve years later, in 2007, Appellant loaned $28,860,000.00 to the owner of the 240 lots, and took back security in the form of a trust deed in those 240 lots and in other real property. Beginning in August 2007, Appellee paved a portion of road within the 3200 Subdivision Phase 2, but was never compensated for this work. (R.978-80.)

Appellant filed a Motion for Summary Judgment with the district court, seeking a determination that Appellee's claim for mechanic's lien foreclosure could not succeed because its lien was invalid. (R.492.) Appellee filed a cross-Motion for Partial Summary Judgment asking the Court to declare that its work was "lienable against the lots abutting the dedicated road." (R.631-32.)

On September 22, 2009, the district court issued an order denying Appellant's Motion for Summary Judgment and granting Appellee's cross-Motion for Partial Summary Judgment. (R.977-1003.) Appellant filed its petition to file an interlocutory appeal on September 29, 2009 (R.1007), which petition was granted on December 8, 2009 (R.1063). The district court has stayed the underlying action pending the outcome of this appeal. (R.1071.)

STATEMENT OF FACTS

The facts of this case are set forth in Appellant's Memorandum in Support of its Motion for Summary Judgment, R.494-96, each of which were undisputed, *see* R.637-640, and are recited verbatim below:

1. The properties that are the subject of this dispute are located in Iron County, Utah, and are more particularly described as follows: All of lots 1 through 240 of 3200 SUBDIVISION, PHASE 2, according to the Official Plat thereof on file in the Office of the Iron County Recorder. Parcel Numbers: D-0223-0002-0001 through D-0223-0002-0240 (hereafter collectively "3200 Subdivision Phase 2"). *See* Plaintiff's Amended Complaint, ¶ 9.

2. In September, 1985, the plat for 3200 Subdivision Phase 2 was made, acknowledged, and recorded with the Iron County Recorder. A certified copy of this plat, with the corporate acknowledgment, corporate dedication of all streets and easements, county acceptance, and signature of the Iron County Attorney, is attached hereto as Exhibit A.

3. At all relevant times, Defendant Braffits Creek Estates, LLC ("Braffits Creek") was the owner of 3200 Subdivision Phase 2. *See* Plaintiff's Amended Notice to Hold and Claim a Lien, a copy of which is attached hereto as Exhibit B; *see also* May 31, 2007 Deed of Trust, relevant pages of which are attached hereto as Exhibit C.

4. At all relevant times, Defendant Omnia Development, Inc. ("Omnia"), was the general contractor relating to work being performed on the 3200 Subdivision Phase 2. *See* Deposition of Steve Barnhart, p. 5, l. 18-23, relevant pages of which are attached hereto as Exhibit D; *see also* Subcontract Agreement, a copy of which is attached hereto as Exhibit F.

5. In May 2007, Defendant Kennedy Funding, Inc. loaned the amount of $28,860,000.00 to Braffits Creek. *See* Promissory Note, a copy of which is attached hereto as Exhibit E. This loan was secured by a trust deed relating to certain real property, including 3200 Subdivision Phase 2. This trust deed was recorded on May 31, 2007 with the Iron County Recorder as Entry no. 553726, Book 1090, beginning page 875. *See* Deed of Trust, Exhibit C.

6. Plaintiff A-T Asphalt Paving, Inc executed a Subcontract Agreement with Omnia dated August 15, 2007 for "installation of 2.5" of hot mix asphalt on all roadways in the Project." *See* Subcontract Agreement, p.3, ¶ 2, Exhibit F. As defined in the Subcontract Agreement, the "project" "is Phase 2.1 of Braffits Mountain, legally described as 3200 Subdivision, Phase II, Iron County, Utah, lots 74 thru 83, 117 thru 130, 142 thru 156, 161 thru 177, 187 thru 202, and 210 thru 216." *Id.*, p.3, ¶ 1.

7. Beginning in August 2007, Plaintiff paved a portion of road within the 3200 Subdivision Phase 2, but was never compensated for this work. *See* Deposition of Darren K. Cottom, p. 47, l. 8-13, relevant pages of which are attached hereto as Exhibit G;

Deposition of Marty Victor Cottom, pp. 24-27, relevant pages of which are attached hereto as Exhibit H.

8. In December 2007, Plaintiff filed with the Iron County Recorder's Office a lien notice for the amount due of $652,114.40, as entry no. 00564739. This notice was filed to include all lots within Phase 2 of the 3200 Subdivision. *See* Exhibit B.

Certain additional facts were set forth by Appellee, entitled "Plaintiff's Statement of Additional Facts." (R.640-643.) With the exception of paragraphs (3) and (13) of Appellee's "Statement of Additional Facts," which were struck by the district court on the grounds of hearsay or because they were otherwise not factually supported, *see* Mem. Dec., pp. 4, 6 (R.980, 982), the allegations set forth in Appellee's "Statement of Additional Facts" are set forth verbatim below[1]:

1. The original developer of the 3200 Subdivision, Phase II ("3200 Phase II") dedicated the roads within the subdivision to Iron County when the subdivision plat was recorded in 1985. However, Iron County has never accepted the roads in 3200 Phase II for county maintenance because the roads were not built to county standards. Iron Countyconsistently told Braffits Creek Estates, LLC ("Braffits Creek") that the 3200 Phase

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[1]Most of the facts recited by Appellee in its "Statement of Additional Facts" are not relevant to the considerations at issue here, and were not referenced in the argument set forth by Appellee below. For instance, paragraphs 1, and 5 though 11, are irrelevant to the issue of whether the roads at issue were, in fact, dedicated, because this matter is controlled by statute, Utah Code section 17-27a-607(1), and there was no dispute by Appellee that the roads it paved were dedicated roads under that statute. *See, e.g.*, Mem. Dec., pp. 2-3, 7-9 (R.978-79, 983-85). Nevertheless, these assertions are recited herein.

II roads would not be accepted for county maintenance. See Affidavit of Stephen R. Platt, ¶ 4, attached hereto as Exhibit 2; see also Affidavit of Steven Barnhart, ¶ 11, attached hereto as Exhibit 3.

2. Prior to the improvements by Braffits Creek, the roads were unimproved roads accessible only by foot, on horse, ATV, or four wheel drive truck[2]. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 5; see also Affidavit of Steven Barnhart, Exhibit 3, ¶ 14, and Exhibit A and C thereto, which are illustrative exhibits of the condition of the roads before the improvements were made. Exhibits B and D illustrate the condition of the road at the same location depicted in Exhibits A and C, during 2006 as improvements were made. Id. Exhibit 3 and Exhibits B and D thereto.

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4. The pavement provided by Plaintiff was an essential part of the development plan of 3200 Phase II. 3200 Phase II was planned as a high-end mountain community and Braffits Creek planned on selling the lots at a premium as they would be improved mountain lots with utilities. Without the pavement, there was no possibility of the development working financially.[3] See Affidavit of Steven Barnhart, Exhibit 2, ¶ 7, 12; see also Deposition of Steve Barnhart, pg 8, ln. 9 through pg. 9, ln. 4, and pg. 16 lns. 3-14, attached hereto as Exhibit 4.

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[2] The district court misconstrued this factual allegation, as discussed more fully below at Section B.1.

[3] Appellant disputed this allegation, as discussed more fully below at Section B.1.

5. Because the 3200 Phase II subdivision plat had been accepted in 1985, none of the modern requirements for accepting a subdivision plat were imposed on the original developer. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 7.

6. Iron County did not request or contract with any group, entity, or individual to make improvements to the 3200 Phase II roads. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 8; see also Affidavit of Steven Barnhart, Exhibit 3, ¶ 8, 9.

7. The improvements of the 3200 Phase II roads were not done pursuant to the Procurement Code, Utah Code Ann. § 63G-1-101, et seq, or any request or award of any contract by the County. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 9.

8. Stephen R. Plat, the Iron County engineer, did not know that Braffits Creek would actually cause the roads to be paved until he saw the road construction happening. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 10.

9. Iron County issued no permits for improvements to the 3200 Phase II roads. Iron County did not inspect the roads. See Affidavit of Stephen R. Platt, Exhibit 3, ¶ 11.

10. Iron County has not received a bond or any financial guarantee for the 3200 Phase II roads. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 12; see also Affidavit of Steven Barnhart, Exhibit 3, ¶ 10.

11. Although the 3200 Phase II roads were dedicated to Iron County in the 1985 plat map, Iron County did not consider the road improvement from an ATV trail to a paved road with underground utilities an Iron County project, but instead viewed it as a private

project to benefit 3200 phase II and the owner of that subdivision. See Affidavit of Stephen R. Platt, Exhibit 2, ¶ 13.

12. Some of the road that was paved by Plaintiff is not located on property dedicated in the 1985 plat as a public roadway, but was instead located in private property owned by Braffits Creek Estates, LLC. The intent was to amend the plat after improvements were made. See Affidavit of Steven Woolsey, Exhibit 5, ¶ 4, and Exhibits A and B thereto; see also Affidavit of Steven Barnhart, Exhibit 3, ¶ 16.

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14. Based on the default of the property owner, Braffits Creek, LLC, and the developer, Omnia Development, Inc., on September 18, 2008, the Court entered judgment for the value of the work and reasonable attorney's fees in the amount of $732,029.96. See Court Docket.

SUMMARY OF ARGUMENTS

Though there are two motions at issue, to wit, Appellant's motion for summary judgment and Appellee's cross-motion for partial summary judgment, the issues at stake are the same. Specifically:

1. Title 38, Chapter 1 of the Utah Code relates to mechanic's liens. The first section of this chapter states that the provisions therein "shall not apply to any public building, structure or improvement." Utah Code Ann. § 38-1-1. The paving work at issue was performed on dedicated roads, which constitute a public structure or improvement.

Under the plain terms of section 38-1-1, this work is not lienable. The district court erred in applying the governing law when it ruled that, despite the plain language of section 38-1-1, Appellee's work on public roads was lienable.

2. Pursuant to section 38-1-3 of the Utah Code, entitlement to a lien requires that work be performed "upon" the property to be liened. A contractor therefore cannot enforce a lien against abutting lots for work that it did not perform "upon" such property. Appellee's paving work, performed on dedicated public roads within a subdivision, cannot be liened against the abutting lots within that subdivision. The district court determined that, despite the clear language of section 38-1-3, and despite the undisputed fact that the relevant work was not performed upon the property liened here, Appellee was entitled to record a lien against abutting lots. This determination contravenes the language of the governing statute as well as interpretative case law. Accordingly, the district court erred when it denied Appellant's motion for summary judgment and when it granted Appellee's motion for partial summary judgment.

3. The district court incorrectly determined that Appellee could lien abutting lots under the holding of *First of Denver Mortgage Investors v. Zundel & Associates*, 600 P.2d 521 (Utah 1979). In making this determination, the district court improperly relied on two issues of "undisputed" fact that were incorrect. To the extent this determination governed the district court's denial of Appellant's motion for summary judgment and its grant of

Appellee's motion for partial summary judgment, the district court erred and its decision should be reversed.

4. The holding in *First of Denver Mortgage Investors* should not be extended to apply to the case at hand, as the plain language of the Mechanic's Lien Statute does not allow for Plaintiff's lien, and Plaintiff had an alternate remedy in the form of a payment bond.

ARGUMENT

A. THE PLAIN LANGUAGE OF THE MECHANIC'S LIEN STATUTE DOES NOT ALLOW PLAINTIFF TO LIEN ABUTTING LOTS FOR WORK PERFORMED ON PUBLIC ROADS.

1. Work Performed on Public Roads is Not Lienable Pursuant to Utah Code Section 38-1-1.

The provisions of Title 38, Chapter 1 of the Utah Code (hereafter the "Mechanics Lien Statute") "shall not apply to any public building, structure or improvement." Utah Code Ann. § 38-1-1. The relevant paving work performed by Appellee was on a public structure or improvement, to wit, dedicated roads. Accordingly, under the plain terms of the Mechanics Lien Statute, this work is not lienable; the provisions of the statute "shall not apply." *Id.* The district court erred in applying the governing law when it ruled that, despite the plain language of section 38-1-1, Appellee's work on public roads was lienable.

"'[T]his Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent.'" *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 843-44 (Utah 1996) (quoting *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982)). "Generally, the best indication of that intent is the statute's plain language." *Id.* at 844 (citing

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038 (Utah 1989)). Thus, this Court interprets a statute "according to its plain language unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute." *Id.* (citing *West Jordan*, 656 P.2d at 446); *see also Trench Shoring Services, Inc. v. Saratoga Springs Development, L.L.C.*, 2002 UT App 300, ¶ 10, 57 P.3d 241 ("We will interpret and apply [a] statute according to its literal wording unless it is unreasonably confused or inoperable."); *Cox Rock Products v. Walker Pipeline Construction*, 754 P.2d 672, 676 (Utah Ct. App. 1988) (same). The plain language of the Mechanic's Lien Statute dictates that the work performed by Appellee is not lienable.

The plat for 3200 Subdivision Phase 2 was "made, acknowledged and recorded" in September, 1985. *See* Undisputed Statement of Fact No. 2, Mem. Dec., p. 2 (R.998). Pursuant to Utah Code section 17-27-607, this plat vested fee title of all streets therein to Iron County. *See* Utah Code Ann. § 17-27a-607(1) ("Plats, when made, acknowledged, and recorded according to the procedures specified in this part, operate as a dedication of all streets and other public places, and vest the fee of those parcels of land in the county for the public for the uses named or intended in those plats."); *see also* Plat (providing for perpetual dedication of "all streets and easements as shown on this plat"), Mem. in Supp. of Kennedy Funding, Inc.'s Mot. for Sum. Judg., Exhibit A (R.504). It is undisputed that Appellee performed the relevant work described in its mechanic's lien on these dedicated roads. *See id.*, Undisputed Statement of Fact Nos. 6-8 (R.495-96); Mem. Dec., pp. 3-4 (R.979-80).

For purposes of the Mechanic's Lien Statute, an "improvement" is one in which there is "an annexation to the land...so that the materials in question can be properly regarded as having become a part of the realty...and this must have been done with the intent of making it a permanent part thereof." *King Bros., Inc. v. Utah Dry Kiln Co.*, 374 P.2d 254, 256 (Utah 1962). Paving a road with asphalt falls within this definition. Moreover, a "public improvement" is "an improvement made to property owned by the state or any other political entity, such as a municipality." *Black's Law Dict.*, Deluxe Eighth Ed., p. 773. *See also Bennett v. Bow Valley Dev. Corp.*, 797 P.2d 419, 422 (Utah 1990) (describing "public improvements" as "including streets, curbs, gutters, sidewalks and utilities"); Utah Code Ann. § 17-27a-306(3)(g)(ii)(C) (discussing "streets or other public improvements"); *id.*, § 63H-1-102(17) (defining term "publicly owned infrastructure and improvements" to include streets and roads).

The paving at issue was performed on a public road and therefore constitutes a "public improvement" to which the Mechanics Lien Statute "shall not apply." Utah Code Ann. § 38-1-1. Because Iron County owns the roads in question, Appellee is not entitled to a mechanic's lien for the work it performed on them. *See id.*

Despite the undisputed facts set forth herein and the clear terms of the governing statute, the district court determined that Appellee's work was, in fact, lienable. *See* Mem. Dec., pp. 8-10 (R.984-86). This ruling was not based on interpretation of the statute itself, but on policy considerations. The court determined that this statute protects against liens on

public property, *see id.*, p.8 (R.984), and against liens arising from work under public contracts, *id.*, p. 9 (R.985). The court ruled that section 38-1-1 did not apply because no lien was placed on public property (but on the privately-owned adjacent lots instead), and because this was a private rather than public contract. *See id.* Last, the court held that the legislative purpose of section 38-1-1 would not be served by applying it to the instant case. *See id.*, pp. 9-10 (R.985-86).

This analysis fails to take into consideration the plain language of section 38-1-1. That section, the very first section found in the Mechanics Lien Statute, does not discuss where a lien is ultimately filed or whether a government contract is in effect. Instead, it simply states that the Mechanics Lien Statute "shall not apply" to public improvements. Because the work at issue was, without question, a "public improvement," there is no room for further interpretation. "'There is nothing to construe where there is no ambiguity in the statute.'" *Cox Rock Products v. Walker Pipeline Construction*, 754 P.2d 672, 676 (quoting *State v. Archuletta*, 526 P.2d 911, 912 (Utah 1974). The district court made no finding that there was any ambiguity in the statute, or that the words were "unreasonably confused or inoperable." *See Trench Shoring Services, Inc. v. Saratoga Springs Development, L.L.C.*, 2002 UT App 300, ¶10 (statute must be interpreted according to its literal wording unless it is "unreasonably confused or inoperable."). Thus, the district court erred in going any further than the literal wording of the statute. Appellant respectfully urges this Court to reverse on

the basis that the district court erred in applying the governing law. *See Berenda v. Langford*, 914 P.2d 45, 50 (Utah 1996).

2. Appellee Cannot Lien Abutting Lots For Paving Work Performed on Public Roads Pursuant to Utah Code Section 38-1-3.

Appellant argued below that, even if section 38-1-1 does not necessarily preclude enforcement of Appellee's lien, pursuant to section 38-1-3 the lien cannot be enforced against adjacent lots for work actually performed on public roads. Appellee countered that, under the "concerning which" language contained within that section, it was entitled to lien the adjacent lots. The district court agreed with Appellee and determined that adjacent lots could be liened for work performed on the public roads. This determination is contrary to the language of the statute and interpretative case law and should be reversed.

Section 38-1-3 states

> Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, *shall have a lien upon the property upon or concerning which they have rendered service*, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise except as the lien is barred under Section 38-11-107 of the Residence Lien Restriction and Lien

> Recovery Fund Act. *This lien shall attach only to such interest as the owner may have in the property.*

Utah Code Ann. § 38-1-3 (emphasis added).

Per the plain language of this section, a lien attaches only "upon the property upon or concerning which [one has] rendered service." *Id.* Because mechanic's liens are "statutory creatures unknown to the common law," no benefits created by the statute are available unless there is "compliance with the statute." *AAA Fencing Co. v. Raintree Development and Energy Co.*, 714 P.2d 289, 291 (Utah 1986); *see also Eccles Lumber Co. v. Martin*, 87 P. 713, 716 (Utah 1906) ("a mechanic's lien is purely statutory, not contractual, and none can be acquired unless the claimant has complied with the several provisions of the statute creating the lien...where the statute fails, courts cannot create rights, and should not do so by unnatural and forced construction."). The work provided by Appellee was not performed "upon" the property it has attempted to lien. Moreover, Utah case law interprets the "concerning which" language as referring to particular artisans whose work necessarily is not performed "upon" real property. *See* below. Accordingly, section 38-1-3 does not provide a benefit to Appellee; it cannot lien property upon which it did not perform the work at issue.

Acknowledging that it did not perform its paving work "upon" the lots it liened, Appellee argued below that section 38-1-3 allows a lien to be recorded when work "just concern[s] the land." (Mem. in Supp. of Plaintiff's Cross-Motion for Sum. Judg. and in Opp. to Kennedy Funding, Inc's Mot. for Sum. Judg., p. 18) (R.654). The district court agreed with Appellee, ruling that "the current language of section 38-1-3 does not require, for the

attachment of a lien, that work performed for the improvement of the lot be performed upon the lot itself," Mem. Dec., p. 25 (R.1001), and allowing Appellee to rely on the "concerning which" language.

This determination is contrary to Utah case law that interprets the plain terms of section 38-1-3. This Court has twice held that the phrase "concerning which" in the mechanics lien statute applies only to architects and engineers and the like who provide drawings and specifications, i.e., where the laborer is not physically present on the property when the services are provided, but the work itself is used to make the improvements on the property:

> From the history and purpose of the statute it appears that the words 'upon or concerning which' were simply intended to be generally descriptive of the manner in which certain work and services are performed. For example, work done by contractors or laborers upon an oil well or building is done upon the property, whereas, the services of architects and engineers is work which may be regarded as done 'with respect to' or 'concerning' the property.

Zions First Nat. Bank v. Carlson, 464 P.2d 387, 388-89 (Utah 1970) (quoting *Stanton Trans. Co. v. Davis*, 341 P.2d 207, 210 (Utah 1959)) (emphasis added).

In reaching that decision, this Court noted that prior to the compilation of Utah statutes in 1933, mechanics liens had been provided for in four separate sections. *Stanton Trans. Co. v. Davis*, 341 P.2d at 209. The section concerning architects, engineers and artisans granted a lien against property to anyone who had "bestowed labor in whole or part, describing, illustrating, or superintending such structure of work done or to be done, or any

part connected therewith. . . ." *Id.* at 210. The Court found that, "[i]n the consolidation with other sections, the cumbersome emphasized language was deleted and the more general term 'or concerning' was inserted as a shorter substitute." *Id.* Thus, the phrase "concerning the property" is a descriptive term only, designed to provide a lien to certain artisans who work directly on the improvement, though the manner in which they perform that work is off-site.

The district court found that each of these cases were distinguishable because the language of the governing statute had changed since these cases were published. *See* Mem. Dec., pp. 14-16 (R.990-92). This determination was incorrect. The key language in this section that describes what land may be liened – "shall have a lien upon the property upon or concerning which they have rendered service" – has remained in its identical form since *Stanton* and *Carlson* were decided. *See Stanton Trans. Co. v. Davis*, 341 P.2d at 209; *Zions First Nat. Bank v. Carlson*, 464 P.2d at 388.

Appellant's argument is buttressed by the fact that section 38-1-3 also provides that a lien "shall attach *only to such interest as the owner may have in the property*." Utah Code Ann. § 38-1-3 (emphasis added). The "property" paved belonged to Iron County, not Braffits Creek; such work was not performed upon the abutting lots. Accordingly, the lien recorded by Appellee is not enforceable. *See id.* As set forth long ago by this Court, "a mechanic's lien attache[s] to the land, and, unless the person against whom the claim for a mechanic's lien is made has some interest or estate in the land upon which the improvement is made, no lien attache[s] to the improvement as such." *Eccles Lumber Co. v. Martin*, 87 P.

at 715. "[I]n order to acquire a lien, an interest in the real estate upon which the improvements are made is necessary." *Id.* at 716. This is consistent with the preceding language found in this section that allows for a lien "upon the property upon..." one has rendered service. Utah Code Ann. § 38-1-3.

There is no dispute that Appellee's work on the dedicated roads was not performed "upon" adjacent lots. There is no provision in the statute that allows Appellee to lien abutting land upon which work was not done. The district court's determination that Appellee may circumvent this requirement by looking to a provision reserved for architects, engineers and the like is unfounded. Accordingly, the district court erred when it held that Appellee is entitled to a mechanic's lien against adjacent lots for work not performed "upon" such lots.

B. *FIRST OF DENVER MORT. INVESTORS V. ZUNDEL & ASSOC'S* DOES NOT ALLOW PLAINTIFF TO LIEN ABUTTING LOTS AND ITS HOLDING SHOULD NOT BE EXTENDED TO DO SO.

1. *First of Denver* Does Not Stand For the Proposition that Abutting Lots May Be Liened and the District Court Erred to the Extent it Held Otherwise.

Appellee cited no direct Utah authority for its proposition that, despite the clear terms of sections 38-1-1 and -3, abutting lots are nevertheless subject to a lien for paving work performed on public roads. Instead, Appellee relied heavily on *First of Denver Mortgage Investors v. Zundel & Associates*, 600 P.2d 521 (Utah 1979). Appellee argued that *First of Denver* "decided the issue of whether lots abutting a road could be liened for the

infrastructure improvements in the road." Mem. in Supp. of Plaintiff's Cross-Motion for Sum. Judg. and in Opp. to Kennedy Funding, Inc's Mot. for Sum. Judg., p. 8 (R.644). No such ruling can be found in *First of Denver*. The issue of dedicated roads or other public property was not at issue nor mentioned in *First of Denver*. There was certainly no mention of whether paving work performed on dedicated, public roads could be liened against adjoining private lots. Instead, *First of Denver* dealt with water and sewer systems that were installed within the confines of a large subdivision, and whether such work should be considered "off-site" and therefore not lienable work. This Court ultimately determined that such endeavors were lienable as they were "necessary to make the residences to be built on such property habitable." *First of Denver Mortgage*, 600 P.2d at 525.[4]

The district court acknowledged that "the improvement here – street paving – is not, strictly speaking, like water and sewer systems, which are 'necessary to make residences to be built on [the] property habitable.'" Mem. Dec., p.18 (R.994) (quoting *First of Denver Mortgage*, 600 P.2d at 525). Nevertheless, the district court determined that the paving work was lienable under the rationale provided in *First of Denver Mortgage* in light of "the

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[4]Other out-of-state cases relied on by Appellee also dealt with the question of whether sewage and water systems could be lienable, given that such systems "make the homes being constructed suitable for habitation." *J.R. Christ Const. Co., Inc. v. Willete Associates*, 221 A.2d 538, 541 (N.J 1966) (holding that such work was "required to make homes habitable," and was "necessary to make the homes...suitable for habitation."); *see also Mitford v. Prior*, 353 F.2d 550, 553 (C.A. Alaska 1965) (same). These cases, like *First of Denver Mortgage*, do not address the issue before the Court – whether paving work performed on public roads can be liened against adjacent private lots.

undisputed facts that 1) the roads paved by Plaintiff were, prior to such paving, 'accessible only by foot, on horse, ATV, or four wheel drive truck,' Pl. St. Add. Facts ¶ 2, and 2) '[w]ithout the pavement, there was no possibility of the development working financially.' Pl. St. Add. Facts ¶ 4. " *Id.*, p. 20 (R.996). This determination of facts had no evidentiary basis, and was improper.

There was no undisputed fact (or any disputed fact, for that matter), that the roads at issue were largely inaccessible before Appellee paved them in 2007. To the contrary, it was undisputed by both parties that the roads had been excavated and graded prior to this time, and that they were quite driveable without any paving whatsoever. Appellee admitted that "most [of] the mountain subdivisions in southern Utah are dirt roads." *See* Barnhart Depo., p. 8, l. 21-22 (Exhibit 4 to Mem. in Supp. of Plaintiff's Cross-Motion for Sum. Judg. and in Opp. to Kennedy Funding, Inc's Mot. for Sum. Judg.) (R.682). The excavated, unpaved roads in Phase 2 looked just like the unpaved roads located in the previously developed and completed Phase 1 of this same subdivision. *See* Deposition of Steve Shrope, pp. 66-67 (attached to Mem. in Further Supp. of Kennedy Funding, Inc.'s Mot. for Sum. Judg as Exhibit J) (R.737-38); Deposition of Gary Goodsell, pp. 73-74 (*id.*, Exhibit K) (R.741-42); Deposition of Ronald Larsen, pp. 58, 147 (*id.*, Exhibit L) (R.745-46); Deposition of Daren Cottam, pp. 40-41 (*id.*, Exhibit M) (R.749-50); Shrope Depo., pp. 58-59) (R.735-36). Appellee had alleged that street improvements (necessarily excavation and grading) were performed in 2006, which was before Appellee's 2007 paving work that is at issue. *See*

Mem. in Supp. of Plaintiff's Cross-Motion for Sum. Judg. and in Opp. to Kennedy Funding, Inc's Mot. for Sum. Judg., p. 5 (R.641). Appellee itself put into evidence the fact that it was only before work began in 2005 that the roads were nothing more than ATV trails, that the subdivision roads were cut in and graded between 2005 and 2006, and that the roads were "later paved" by Appellee in 2007. *See, id.,* Exhibit 3, ¶¶ 12-15 (R.674-75). Thus, these roads were driveable prior to the installation of pavement. The district court's factual conclusion to the contrary was not urged by either side, and is unsupported by the evidence. It is undisputed that Appellee's paving work was *not* necessary to make the roads driveable or otherwise "habitable," so as to fall within the *First of Denver* rationale.

So, too, does the district court's factual finding regarding the finances of the development lack an evidentiary foundation. The affidavit on which it was based was the unfounded and conclusory opinion of one person regarding the development plans and financial expectations of another entity, Braffits Creek. *See* Affidavit of Steve Barnhart, ¶7 (Exhibit 3 to Appellee's Mem. (R.637)). Appellant pointed this out to the district court at page 3 of its reply memorandum, R.715, noting that conclusory affidavits that contain only unsubstantiated belief rather than personal knowledge are insufficient on summary judgment. *See Brown v. Wanlass*, 2001 UT App 30, ¶ 7, 18 P.3d 1137. The trial court relied upon it anyway, *see* Mem. Dec., p.4 n.3, which was improper given the absence of foundation for this particular assertion.

"On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995); *see also Territorial Savings & Loan Ass'n v. Baird*, 781 P.2d 452, 456 (Utah Ct. App. 1989) (holding that a trial court "must not weigh or resolve disputed evidence"). Indeed, "a challenge to a summary judgment presents for review only conclusions of law because, by definition, cases decided on summary judgment do not resolve factual disputes." *Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108, 1111 (Utah 1991). Accordingly, the district court erred to the extent it determined that, based upon the two incorrect factual findings set forth above, the holding in *First of Denver Mortgage* allowed Appellee to lien adjacent lots.[5]

2. The Authorities Provided By Appellant Below, Rather Than *First of Denver*, Were Applicable to the Facts of This Case.

Conversely, Appellant provided the district court with certain additional authority consistent with its argument that paving work on public roads was not lienable against adjacent private lots. For instance, in *Shelby Contracting Co., Inc. v. Pizitz*, 231 So.2d 743 (Ala. 1970), the Alabama Supreme Court held that dedicated street improvements within a subdivision could not be liened against abutting lots. After recognizing the split of authority

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[5]It is not entirely clear whether and to what extent the district court relied on the holding in *First of Denver Mortgage*. While the district court indicated that "allowing Plaintiff's lien here is proper" under that decision, Mem. Dec., p. 20, it later held that the lien was proper under the language of section 38-1-3 itself. *Id.*, p. 25. However, to the extent the district court relied on these two incorrect "statements of fact" for its conclusion that abutting lots were lienable, that decision was erroneous.

nationwide on the issue, the *Shelby* Court noted that decisions in favor of lien claimants rested on the proposition "that improvements constructed on the street entitle the mechanic...to a lien because the street is part of the abutting lot." *Id.* at 746. The *Shelby* Court rejected this theory because in Alabama (like Utah) the dedicated street is not a part of the abutting lot. Citing Alabama's road dedication statute (which, like Utah Code section 17-27a-607(1), states that recordation of an acknowledged subdivision plat grants the city title to the roads in fee simple), the *Shelby* Court held that any present "interest" in the road was the same any other member of the public would enjoy:

> [S]o long as the 'street' exists, the interest of the lot owner in the 'street' is merely the right to enter it and to use it in common with the rest of the public The lot owner cannot sell the 'street' or lease it or control its use by other persons or control the height of the surface or the nature of objects or material to be placed in or on it so long as it remains a 'street.'

Id. at 750. The *Shelby* Court held that a lot owner's only "interest" in an abutting public road is, in essence, an "interest in the nature of a possibility of reverter," an interest so insignificant that no lien can attach:

> By whatever name called, the lot owner's interest in the street, at most, is a contingent expectancy dependent on an event which may never occur. We are of opinion that the better view is that the lot owner's interest in the 'street' does not make the 'street' a part of the abutting lot so that an improvement on the 'street' is an improvement on the lot so as to make the lot subject to a lien for such improvement.

Id.

This analysis is consistent with Utah law, which holds that an abutting owner owns, at best, a "reversionary interest" in a street. *Ash v. State*, 572 P.2d 1374, 1378 (Utah 1977). *See also White v. Salt Lake City*, 239 P.2d 210, 213 (Utah 1952) ("[T]he Legislature did not regard the dedication to the public of a street in a platted subdivision as the surrender of an easement with retention of the fee to the corpus in the abutting owner."). At present, the abutting lot owners have no interest in the dedicated roads, as these roads were granted in fee simple to the County. *See Ash*, 572 P.2d at 1378 ("When the state took the property in fee simple, it would also be expected to take this reversionary interest."). As such, the *Shelby* analysis is applicable here, and prevents Appellee from liening abutting lots for work it performed on the dedicated roads.

In addition, Appellant cited *Brannan Sand & Gravel Co. v. Sante Fe Land & Improvement Co.*, 332 P.2d 892 (Colo. 1958), wherein the Colorado Supreme Court examined a statute very similar to Utah's ("subcontractors...shall have a lien upon the property upon which they have rendered service") and affirmed a district court determination that public street improvements could not be liened against abutting lots. *Id.*, 893-94. The Court held that the statute imposed "two limitations on the lien involved. First, it is granted only upon the property upon which the labor, services and material are bestowed or rendered; second, only to the extent of the value of the labor, services and material *rendered upon the property*." *Id.* at 894 (emphasis in original). Thus, the Court determined that land upon which the road work was not performed could not be liened for such work:

> By the statute...the lien is restricted to the land of the contracting owner, or his interest in it, at the time of making the contract, and is further restricted to the work done ' upon such land.' * * * the remedy by lien being purely statutory, and to be strictly construed, Johnston was powerless to charge lands of which he was not the owner, and in which he had no legal interest, with a lien, he was also equally powerless to charge his individual property with a lien for construction, improvement, and betterment of land belonging to others.

Id. Like *Shelby*, this analysis applies to the instant case and buttresses Appellant's argument concerning application of section 38-1-3.

Ultimately, the district court acknowledged the cases cited by Appellant, but rejected (either implicitly or explicitly) their application to this case due to the district court's interpretation of section 38-1-3. *See* Mem. Dec., pp. 20-25 (R.996-1001). Curiously, though the district court recited that the *Brannan* case was "distinguishable," it never said why that was the case. Mem. Dec., p. 20 (R.996). In regard to the *Shelby* case, the district court conceded that, "if the Court were required to answer the question posed in *Shelby* – namely, 'whether or not an improvement, such as...paving...which is actually upon the street, is to be regarded as being upon the lot which abuts on the street'...the Court would likely be compelled to reach the same conclusion reached there." Mem. Dec., p. 24 (R.1000). However, the district court held that *Shelby* was not applicable because section 38-1-3 does not require work to be "upon" the property liened: "Because the language and purpose of section 38-1-3 support Plaintiff's lien claim, and neither Utah precedents nor those of other

states refute it, Plaintiff's motion for partial summary judgment is granted and [Appellant's] summary judgment motion is denied." *Id.*, p. 25 (R.1001).

As set forth above, the language of section 38-1-3 does not support the conclusion reached by the district court. Thus, the *Shelby* decision should have confirmed that Appellant's argument was correct. Moreover, because the plain language did not support Appellee's argument, there was nothing to "refute;" instead, the onus should have been on Appellee to set forth authority that could show why the statute should be expanded or enlarged. *See, e.g., DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 844 (this Court interprets a statute "according to its plain language unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute."); *Trench Shoring Services, Inc. v. Saratoga Springs Development, L.L.C.*, 2002 UT App 300, ¶ 10 ("We will interpret and apply [a] statute according to its literal wording unless it is unreasonably confused or inoperable."). Because no such authority was presented, the district court should have granted Appellant's motion for summary judgment under the plain terms of the Mechanic's Lien Statute.

3. *First of Denver* Should Not Be Extended to Apply to This Case.

The district court ultimately made a policy determination when it determined that Appellee was entitled to lien the abutting lots in question. *See, e.g.*, Mem. Dec., pp. 18-20 (R.1004-06). This policy determination traverses a problematic course. The language of the statute mandates that work be performed *upon* the property to be liened. It does not speak in

terms of "benefits" provided. If this language is to be eschewed whenever work simply benefits certain property, the question raised is where to draw the line. Many different projects could fall within these parameters. The roofline of one residence in a subdivision could be redesigned so as to afford better views to the houses to be built on uphill lots; would the unpaid architect be able to lien the uphill lots? What if the work is arguably a detriment? Reasonable people disagree as to whether dog parks or public trails benefit or harm adjacent properties; is the work to build such an improvement lienable against the entire subdivision? Against adjacent lots? To avoid such arguments, the legislature has drawn the line with the words it has used in drafting sections 38-1-1 and 38-1-3 – the work must be performed "upon" property in order to entitle someone to a lien on that property.

This Court has already once expanded the scope of section 38-1-3 by allowing for a lien where work for work that is "necessary to make residences to be built on such property habitable." *First of Denver*, 600 P.2d at 525. As set forth above, there is no dispute that this exception does not apply here. Appellant respectfully submits that this Court should not further expand the scope of this section to apply to the facts of this case, to wit, where work was not necessary to make residences on the adjacent lots habitable; indeed, the paving work was not even performed throughout the entirety of the subdivision. "Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent. Rather, we are guided by the rule that a statute should generally be construed according to its plain language." *Garrard v. Gateway Financial Services, Inc.*, 2009 UT 22, ¶ 11, 207

P.3d 1227 (quoting *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989)). This rule should apply here. The statute, as written, is clear and prevents arbitrary or uncertain application of its provisions.

There is no need to expand the provisions of the mechanics lien statute to protect the Appellee because had another remedy available to it. Appellee could and should have required Braffits Creek (the entity with whom it contracted) to obtain a payment bond. The Utah Code specifically provides for such protection, and provides a cause of action against an owner for failure to obtain a bond. *See* Utah Code Ann. § 14-2-1, *et seq.* As set forth therein:

> Before any original commercial contract exceeding $50,000 in amount for the construction, alteration, or repair of any building, structure, or improvement upon land is awarded to any contractor, the owner shall obtain from the contractor a payment bond:
>
> (a) complying with Subsection (3); and
> (b) that becomes binding upon the award of the original commercial contract to the contractor.

Id., § 14-2-1(2). Section 14-2-2 then provides a remedy for failure of an owner to obtain a payment bond. *See id.*, § 14-2-2(1). Particularly in light of the dollar amount of the contract at issue, this would have been an easy and sensible solution.

The district court's policy determination that Appellee's lien is enforeceable should be reversed. Appellant respectfully urges this Court to apply the letter of the lien statute and to refrain from further expansion of the holding in *First of Denver*.

CONCLUSION

Appellant respectfully requests that this Court reverse the district court and remand this matter with direction to grant Appellant's motion for summary judgment and dismiss Plaintiff's Amended Complaint as against Defendant. Because it is undisputed that the work at issue was performed on dedicated roads, there is no genuine issue as to any material fact and Defendant is entitled to a judgment as a matter of law. *See* Utah R. Civ. P. 56(c).

DATED this 2nd day of April, 2010.

COHNE, RAPPAPORT & SEGAL, P.C.

Leslie Van Frank
Bradley M. Strassberg
Attorneys for Appellant Kennedy Funding, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing memorandum was mailed, postage fully prepaid, on the 2nd day of April, 2010, to the following:

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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

IRON COUNTY, STATE OF UTAH

A-T ASPHALT PAVING, INC., a Utah corporation, Plaintiff, v. BRAFFITS CREEK ESTATES, INC., a Utah limited liability corporation; OMNIA DEVELOPMENT, INC., a Utah corporation; CRESCENT PROPERTIES, LLC, a Nevada limited liability company; ANB FINANCIAL N.A., an Arkansas National Association; KENNEDY FUNDING, INC., a New Jersey corporation; R&W EXCAVATING, INC., a Utah corporation; SCHWAB SALES, LLC, an Arizona limited liability company; and John Does 1-5, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING DEFENDANT KENNEDY FUNDING, INC.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT** Case No. 080500072 Judge John J. Walton

On June 10, 2009, Defendant Kennedy Funding, Inc. ("KFI"), moved for summary judgment and filed a supporting memorandum ("KFI Mem. in Supp." or "KFI's Supporting Memorandum"). On July 8, Plaintiff A-T Asphalt Paving, Inc., filed a cross-motion for partial summary judgment and a combined memorandum opposing KFI's motion and supporting its own ("Pl. Comb. Mem."). On July 17, KFI filed a combined memorandum further supporting its motion and opposing Plaintiff's, and requested that its motion be submitted for decision ("KFI

Comb. Mem."). On July 31, Plaintiff filed a reply memorandum in support of its motion ("Pl. Reply"). On September 8, the Court heard oral argument on the motions. Having considered the parties' written and oral arguments, and the relevant law, the Court now denies KFI's motion and grants Plaintiff's motion for the reasons set forth below.

BACKGROUND

Except as noted, the facts below are undisputed.

KFI's Statement of Facts

1. The properties that are the subject of this dispute are located in Iron County, Utah, and are more particularly described as follows: All of lots 1 through 240 of 3200 SUBDIVISION, PHASE 2, according to the Official Plat thereof on file in the Office of the Iron County Recorder. Parcel numbers: D-0223-0002-0001 through D-0223-0002-0240 ("3200 Phase 2").

2. In September 1985, the plat for 3200 Phase 2 was made, acknowledged, and recorded with the Iron County Recorder. A certified copy of this plat, with the corporate acknowledgment, corporate dedication of all streets and easements, county acceptance, and signature of the Iron County Attorney, is attached as Exhibit A to KFI's Supporting Memorandum.

3. At all relevant times, Defendant Braffits Creek Estates, LLC ("Braffits Creek"), was the owner of 3200 Phase 2.

4. At all relevant times, Defendant Omnia Development, Inc. ("Omnia"), was the general

contractor relating to work being performed on 3200 Phase 2.

5. In May 2007, KFI loaned the amount of $28,860,000.00 to Braffits Creek. This loan was secured by a trust deed relating to certain real property, including 3200 Phase 2. This trust deed was recorded on May 31, 2007, with the Iron County Recorder as Entry no. 553726, Book 1090, beginning page 875.

6. Plaintiff executed a Subcontract Agreement with Omnia dated August 15, 2007, for "installation of 2.5" of hot mix asphalt on all roadways in the Project." As defined in the Subcontract Agreement, "'*Project*' is Phase 2.1 of Braffits Mountain, legally described as 3200 Subdivision, Phase II, Iron County, Utah, lots 74 thru 83, 117 thru 130, 142 thru 156, 161 thru 177, 187 thru 202, and 210 thru 216."[1]

7. Beginning in August 2007, Plaintiff paved a portion of road within 3200 Phase 2, but was never compensated for this work.

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[1] Plaintiff admits this fact, but asserts that "the Subcontract Agreement was not executed on August 15, 2007, but . . . at a later time at the request of Omnia . . . on the representation that it was required in order for [Plaintiff] to be paid for the paving work on [3200 Phase 2]." "Plaintiff further disputes the legal conclusion that the project was limited to 'Phase 2.1' and alleges that that language was used after the fact to protect against Plaintiff's potential lien. Finally, Plaintiff disputes the implication that work done in 2006 and 2007, before [KFI] recorded its trust deed, did not improve 'Phase 2.1' within the meaning of Utah's mechanic's lien statute even if some–although not all–work done during that period of time was off site." As an example, Plaintiff avers that "the road [it] paved in 2006 leading to phase 2.1 had no other destination but phase 2.1 and thus improved the value of phase 2.1 lots even though that work was off site." Pl. Comb. Mem. at 3-4.

8. In December 2007, Plaintiff filed with the Iron County Recorder's Office a lien notice for the amount due of $652,114.40, as entry no. 00564739. This notice was filed to include all lots within 3200 Phase 2.

Plaintiff's Statement of Additional Facts ("Pl. St. Add. Facts")

1. The original developer of 3200 Phase 2 dedicated the roads within the subdivision to Iron County when the subdivision plat was recorded in 1985. However, Iron County has never accepted the roads in 3200 Phase 2 for county maintenance because the roads were not built to county standards. Iron County consistently told Braffits Creek that the 3200 Phase 2 roads would not be accepted for county maintenance.

2. Prior to the improvements by Braffits Creek, the roads were unimproved roads accessible only by foot, on horse, ATV, or four wheel drive truck.

3. This fact statement has apparently been withdrawn. (KFI objected to it on hearsay grounds, and Plaintiff omitted it in its reply memorandum.)[2]

4. The pavement provided by Plaintiff was an essential part of the development plan of 3200 Phase 2. 3200 Phase 2 was planned as a high-end mountain community and Braffits Creek planned on selling the lots at a premium as they would be improved mountain lots with utilities. Without the pavement, there was no possibility of the development working financially.[3]

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[2] The omitted fact statement alleged that, "[a]t some time during 2005, Braffits Creek informed Stephen Platt, the Iron County engineer, that it wished to make improvements within [3200 Phase 2], which improvements would include the paving of the roads within the subdivision."

[3] Plaintiff has supported these statements by references to the affidavit and deposition testimony of Mr. Barnhart. KFI argues that "[t]hese allegations lack evidentiary foundation, as

5. Because the 3200 Phase 2 subdivision plat had been accepted in 1985, none of the modern requirements for accepting a subdivision plat were imposed on the original developer.

6. Iron County did not request or contract with any group, entity, or individual to make improvements to the 3200 Phase 2 roads.

7. The improvements of the 3200 Phase 2 roads were not done pursuant to the Procurement Code, Utah Code section 63G-1-101 et seq., or any request or award of any contract by the County.

8. Stephen R. Platt, the Iron County engineer, did not know that Braffits Creek would actually cause the roads to be paved until he saw the road construction happening.

9. Iron County issued no permits for improvements to the 3200 Phase 2 roads. Iron County did not inspect the roads.

10. Iron County has not received a bond or any financial guarantee for the 3200 Phase 2 roads.

11. Although the 3200 Phase 2 roads were dedicated to Iron County in the 1985 plat map, Iron County did not consider the road improvement from an ATV trail to a paved road with underground utilities an Iron County project, but instead viewed it as a private project to benefit

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Mr. Barnhart simply opines as to the development plans of another entity, Braffits Creek." KFI Comb. Mem. at 3. Plaintiff says that Mr. Barnhart's personal knowledge of such plans is demonstrated by the fact that 1) "Omnia was the managing contractor for site development and off-site development of Braffits Creek"; 2) "[Mr.] Barnhart's specific employment at Omnia was to 'organize [the] subcontractors, to do all the infrastructure for the project and to supervise the installation of [that] infrastructure'"; and 3) "[Mr.] Barnhart worked directly for James Fales, the same owner of Braffits Creek." In short, "[Mr.] Barnhart was not simply opining as to the development plans of another entity, but was actually employed to carry out the development plans and has personal knowledge of them." Pl. Reply at 2. The Court agrees with Plaintiff.

3200 Phase 2 and the owner of that subdivision.

12. Some of the road that was paved by Plaintiff is not located on property dedicated in the 1985 plat as a public roadway, but was instead located in private property owned by Braffits Creek. The intent was to amend the plat after improvements were made.[4]

13. This fact statement is insufficiently supported to be considered.[5]

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[4] Plaintiff has supported these statements by references to the affidavit testimony of Mr. Woolsey and Mr. Barnhart. KFI again challenges foundation, arguing that Mr. Barnhart's affidavit testimony here "consists simply of an unsupported conclusion," and that Mr. Woolsey's affidavit testimony is unsupported because he "was a surveyor; he did not engineer the roads within [3200 Phase 2]" and "'never provided any vertical control work for the existing roads.'" KFI Comb. Mem. at 6. Plaintiff stresses that Mr. Barnhart's affidavit states that it is based on personal knowledge, and notes that "[Mr.] Woolsey was the vice-president of InSite Engineering at the time InSite Engineering was retained to do survey work and other engineering work related to [3200 Phase 2]," and Woolsey's testimony is supported "with an AutoCAD drawing that was produced in conjunction with his work, and shows where the paved road varies from the dedicated road." Finally, citing Mr. Woolsey's deposition testimony, Plaintiff states that he "personally located the centerline of the existing road, lots corners, and conducted a survey of the property, giving him more than a sufficient basis to testify as to the location of the roadway." Pl. Reply at 3. Again, KFI's challenge is rejected. Even if Mr. Barnhart's affidavit fails to establish his competence to testify about the location of the pavement relative to the platted road, Mr. Woolsey's is clearly adequate. He is a surveyor who actually located the centerline of the platted road and certain existing property corners.

[5] The omitted statement of paragraph 13 is: "Moreover, Plaintiff paved several private driveways to different lots within 3200 Phase 2." This statement is supported by reference to Mr. Barnhart's affidavit, which is equally unspecific. KFI argues that this evidence would not be admissible at trial, and is therefore insufficient on summary judgment, because "Plaintiff has provided no evidence as to what lots it purportedly paved, the cost of such work, or when such work was performed." Additionally, KFI "denies these allegations, as they are inconsistent with Plaintiff's Subcontract Agreement, which provides only for 'installation of 2.5" of hot mix asphalt on all roadways in the Project.'" KFI Comb. Mem. at 6-7. Plaintiff rests on Mr. Barnhart's employment with Omnia, "the managing contractor for both onsite and offsite development"; the long hours he worked "from August, 2005 through about November, 2007"; and his alleged personal knowledge. The Court agrees with KFI's position that this statement is inadmissible due to Plaintiff's failure to identify any of the lots where driveways were allegedly paved. See Utah R. Civ. P. 56(e) ("When a motion for summary judgment is made and

14. Based on the default of the property owner, Braffits Creek, and the developer, Omnia, on September 18, 2008, the Court entered judgment for the value of the work and reasonable attorney fees in the amount of $732,029.96.

ANALYSIS

The parties' competing summary judgment motions are predicated on the same basic issues, so this decision addresses the issues rather than the motions.

Utah Code section 38-1-1's exclusion of public improvements from the mechanics' lien statute does not make the paving of dedicated streets pursuant to a private contract nonlienable.

Beginning with the premise that Utah's mechanics' lien law is expressly inapplicable "to any public building, structure, or improvement," Utah Code Ann. § 38-1-1, and noting that platted roads constitute public property, see id. § 17-27a-607(1),[6] KFI argues that Plaintiff's work paving the platted roads was a nonlienable public improvement as a matter of law. KFI cites a number of cases from other jurisdictions holding that public property is not subject to mechanics'

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supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth *specific* facts showing that there is a genuine issue for trial."). Cf. Tripp v. Vaughn, 747 P.2d 1051, 1054 (Utah Ct. App. 1987) (existence of a roadway "was not a material factual issue" at trial where "[t]he evidence regarding the existence of a roadway was scant and was not seriously disputed by respondent," and in any event, "insufficient evidence was submitted to allow the court to find that the roadway was lienable work" because "[t]here was no indication in the evidence as to who constructed the roadway or whether they would be entitled to a lien on the property").

[6] Utah Code section 17-27a-607(1) provides: "Plats, when made, acknowledged, and recorded according to the procedures specified in this part, operate as a dedication of all streets and other public places, and vest the fee of those parcels of land in the county for the public for the uses named or intended in those plats."

liens. See Hydro Conduit Corp. v. American-First Title & Trust Co., 808 F.2d 712, 716 (10th Cir. 1986); North Bay Construction, Inc. v. City of Petaluma, 49 Cal. Rptr. 3d 455, 462 (Cal. Ct. App. 2006); City of Westminster v. Brannan Sand & Gravel Co., 940 P.2d 393, 396 (Colo. 1997); Brannan Sand & Gravel Co. v. Santa Fe Land & Improv. Co., 332 P.2d 892, 893 (Colo. 1958); Haselwood v. Bremerton Ice Arena, 155 P.3d 952, 958 (Wash. Ct. App. 2007).

In response, Plaintiff does not challenge the proposition that mechanics' liens are not allowed on public property or for public improvements, but denies the applicability of that rule here. Plaintiff argues that Utah Code section 38-1-1 "is meant to address public construction projects as well as to protect public property from liens." Pl. Comb. Mem. at 10 (citing Cox Rock Products v. Walker Pipeline Construction, 754 P.2d 672 (Utah Ct. App. 1988)). In Cox Rock, the Court of Appeals explained that, because "subcontractors and suppliers are precluded under the mechanic's lien statute from placing a lien on 'any public building, structure or improvement,'" "suppliers and subcontractors have principally looked for protection to the second device, namely that of the payment bond, when providing labor or supplies for construction projects *contracted for by governmental entities*." Id. at 674 (emphasis added). Observing that its lien is not on public property, and that the work on which the lien is based was performed pursuant to a private contract rather than under any agreement with Iron County, Plaintiff argues that the work done here is not properly characterized as a public improvement.

The Court agrees with Plaintiff. Utah cases have explained that section 38-1-1 protects against liens on public property, see Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648, 650 (Utah 1986) (noting that "the materialman is precluded under U.C.A., 1953, § 38-1-1 from placing a

lien *on public property*") (emphasis added and footnote omitted), and against liens arising from the provision of work or supplies under public contracts. See Western Coating v. Gibbons & Reed Co., 788 P.2d 503, 503-04 (Utah 1990) ("We have reasoned that since mechanic's lien protection is not available *in public contracts*, 'performance bonds are required on public projects to provide substitute protection for laborers and material providers.'") (quoting CECO v. Concrete Specialists, Inc., 772 P.2d 967, 970 (Utah 1989)); Cox Rock, 754 P.2d at 674.

Neither of these circumstances is present here. Although the work here was technically performed on public property (or at least on property that was ultimately intended to be public),[7] no lien has been filed on any public property. Rather, Plaintiff filed its lien on all of the lots within 3200 Phase 2, which are privately owned by Braffits Creek. The lien did not arise from the performance of a public contract, but of a private one, the purpose of which was to enhance the value of Braffits Creek's private property. Although the public undeniably benefitted from the paving of a previously unpaved public road, the Court would have to close its eyes to the facts to categorize the paving as a public improvement.

Moreover, it is difficult to see how calling the paving project a public improvement would serve the legislative purpose of section 38-1-1. KFI itself asserts that "[t]his section codifies the common law exemption of public property from mechanics [sic] liens, the purpose of which was 'to preserve essential public services and functions while protecting those who

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[7] It is undisputed that, insofar as Plaintiff's paving did not exactly follow the plat, "[t]he intent was to amend the plat [to reflect such deviations] after improvements were made." Pl. St. Add. Facts ¶ 12.

benefit from public services and facilities.'" KFI Mem. in Supp. at 4 (quoting City of Westminster v. Brannan Sand & Gravel Co., 940 P.2d 393, 395 (Colo. 1997) (internal citation omitted)). Accepting this as a correct summary of the section's purpose, there is no reason to believe such purpose will be defeated or undermined in any way by the allowance of Plaintiff's lien. As Plaintiff points out, it has not liened the paved streets themselves and enforcement of its lien therefore poses no threat of interference with public passage thereon. Pl. Comb. Mem. at 13 (quoting J.R. Christ Constr. Co. v. Willette Assocs., 221 A.2d 538, 542 (N.J. 1966) ("It has been suggested that allowing mechanics' liens for the construction of sewers under public streets would result in interference with the public's right of way if and when such liens were enforced. We think this view is based on a misconception. Enforcement of liens arising from the installation of sewers would not result in the sale of streets for private use. Rather, such liens are enforced by selling the land and buildings abutting the street, the land and buildings which benefit from the improvements.")).

Pursuant to Utah Code section 38-1-3, the paving of dedicated roads pursuant to a private contract entered into by the owner of private property abutting the roads and for the purpose of enhancing the value of such property gives rise to a lien on such property.

The parties emphasize different parts of Utah Code section 38-1-3 to support their respective positions on the issue of whether a lien for the work done on the roads may attach to the abutting property. That section provides:

> Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished

> designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise except as the lien is barred under Section 38-11-107 of the Residence Lien Restriction and Lien Recovery Fund Act. This lien shall attach only to such interest as the owner may have in the property.

Pointing to the final sentence of this section, which limits the attachment of liens "to such interest as the owner may have in the property," KFI argues that no lien for the work done on the roads may attach to the abutting lots because "[t]he 'property' paved belonged to the county, not Braffits Creek; such work was not performed upon the abutting lots." KFI Mem. in Supp. at 5-6.

Plaintiff, on the other hand, focuses on the allowance of a lien for the "improvement to any premises in any manner," which lien shall be "upon the property upon or concerning which they have rendered service . . . ." Because the work Plaintiff performed concerned the abutting lots, Plaintiff argues that a lien on such lots is appropriate, and is not an "attempt[] to attach any more interest than Braffits Creek Estates, LLC has in the property that was directly benefitted by Plaintiff's work." Pl. Comb. Mem. at 18.

KFI responds that "the Utah Supreme Court has twice held that the phrase 'concerning which' in the mechanics [sic] lien statute applies only to architects and engineers and the like who provide drawings and specifications, i.e., where the laborer is not physically present on the property when the services are provided but the work itself is used to make the improvements on the property," KFI Comb. Mem. at 12, and quotes the following excerpt from Zions First

National Bank v. Carlson, 464 P.2d 387 (Utah 1970):

> From the history and purpose of the statute it appears that the words "upon or concerning which" were simply intended to be generally descriptive of the manner in which certain work and services are performed. For example, work done by contractors or laborers upon an oil well or building is done upon the property, whereas, the services of architects and engineers is work which may be regarded as done "with respect to" or "concerning" the property.

Id. at 388-89 (quoting Stanton Trans. Co. v. Davis, 341 P.2d 207, 210 (Utah 1959)).

KFI repeats the observations made in Davis that section 38-1-3 incorporates provisions from what were, prior to 1933, four distinct sections; that the pre-1933 section relating to architects, engineers, and artisans allowed a lien for "bestow[ing] labor *in whole or part, describing, illustrating, or superintending such structure of work done or to be done, or in any part connected therewith*"; and that, "[i]n the consolidation with other sections the cumbersome emphasized language was deleted and the more general term 'or concerning' was inserted as a shorter substitute." Davis, 341 P.2d at 210. KFI concludes:

> Thus, the phrase "concerning the property" is a descriptive term only, designed to provide a lien to those who work directly on the improvement that is on-site, but the manner in which they perform that work is off-site.
>
> Plaintiff's work on the dedicated roads was not performed "upon" adjacent lots, and Plaintiff is not entitled to circumvent this requirement by attempting to fit within a provision reserved for architects and engineers.

KFI Comb. Mem. at 13.

In reply, Plaintiff denies that the phrase "concerning which" is applicable only to architects and engineers. It stresses that the excerpt above, which is found in both the Carlson and Davis cases, and which explains how the phrase should be understood, uses the term, "[f]or

example," when saying that "the services of architects and engineers is work which may be regarded as done 'with respect to' or 'concerning' the property," indicating that the "concerning which" language does not apply exclusively to members of these professions.

Plaintiff correctly notes that whether the "concerning which" language applied to the lien rights of claimants other than architects and engineers was not a holding or an issue in Carlson, which involved the work of an architect. Pl. Reply at 8. It summarizes Davis as holding "that the cost of transporting a drilling rig to the site of an oil well was not lienable," and says that "[a] closer look at [that] case reveals that the court's reasoning was concerned more with the remoteness of the benefit created to the land when the drilling rig was transported to the site." Pl. Reply at 8-9. Plaintiff recounts facts relevant to this aspect of the case, and distinguishes them from those present here as follows:

> The property owner entered into a contract to have his land drilled at a certain price per foot. The drilling company then hired another company to transport its drilling rig to the property. The owner of the drilling rig sought a lien for the transportation cost. The court stated that interpreting the "concerning which" language too broadly could result in opening "the door to unforeseeable risks for the property owner." However, this is obviously not a risk in the case before the Court. In this case, the owner of the property is the party that requested the paving work and having its property liened for the cost of the work was not an unforeseeable risk. Further, the fact that the roads were paved providing access to abutting lots, is open and apparent to all lot owners. This is not a fact like transporting a drilling rig, that may occur without the owner being aware that a separate bill or charge over and above the cost of drilling the well, might result.

Pl. Reply at 9 (citations omitted).

Plaintiff is correct in identifying the foreseeability of the risks for the property owner as a factor in the Davis court's decision, 341 P.2d at 210, and the Court agrees with Plaintiff's

conclusion–for the reasons Plaintiff has given–that this concern is absent here. Cf. Graco Fishing & Rental Tools v. Ironwood Exploration, 766 P.2d 1074, 1077 (Utah 1988) (distinguishing Davis on this ground, and holding, "in light of the purpose of the mechanic's lien statute, preventing a windfall to property owners at the expense of equipment, material, and labor suppliers," that "reasonable transportation charges [for rental equipment] are lienable"), superseded by statute on other grounds as stated in Trench Shoring Servs. v. Saratoga Springs Dev., L.L.C., 57 P.3d 241, 245 (Utah Ct. App. 2002).

On the other hand, the Court agrees with KFI that, under Davis, the "concerning which" language of the statute may not operate to give contractors, subcontractors, etc. lien rights. The court clearly found the phrase "upon or concerning which" to be descriptive rather than prescriptive. See Davis, 341 P.2d at 210 ("From the history and purpose of the statute it appears that the words 'upon or concerning which' were simply intended to be generally descriptive of the manner in which certain work and services are performed.").

However, in reaching this conclusion, as KFI observed at oral argument, the Davis court relied, in part, on language in section 38-1-3 that expressly limited the lien rights of contractors and subcontractors:[8]

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[8] The version of section 38-1-3 applied in Davis provided, in pertinent part:

> [1] Contractors, subcontractors and all persons performing labor upon, or furnishing materials to be used in, the construction or alteration of, or addition to, or repair of, any building, structure or improvement upon land; [2] all foundry men and boiler makers; [3] all persons performing labor or furnishing materials for the construction, repairing or carrying on of any mill, manufactory or hoisting works; [4] all persons who shall do work or furnish materials for the prospecting,

> A difficulty with [the lien claimant's] argument that the latter phrase ["or concerning which"] should be given such a broad application to the entire statute is that doing so would be at variance with the tenor of these statutes and particularly the words creating a lien for labor and materials The lien given to contractors and laborers specifies the "performing labor *upon*, or furnishing materials to be used in or repair building or improvement *upon* [the] land " If the more general phrase "or concerning which" were controlling as to that class of lien claimants, the specific language requiring the work or materials to be upon the property would be idle verbiage

341 P 2d at 210 (emphasis added)

Contrary to KFI's assertion at oral argument that the relevant statutory language remains the same today, the current statute omits, among other things, the preposition "upon" emphasized in the above excerpt, and makes a lien available to "[c]ontractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner " Utah Code Ann § 38-1-3 Since Davis specifically explained that the now-omitted language "requir[ed] the work or materials to be upon the property," 341 P 2d at 210, the Legislature's decision to remove such language appears to reflect an intent to remove

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> development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit [5] and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of the service rendered, labor performed or materials furnished by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise

341 P 2d at 209 (bracketed subdivisions added in Davis)

this requirement.

Moreover, doubts in this regard may be resolved by resorting to the purpose of the legislation in question. See John Wagner Assoc. v. Hercules, Inc., 797 P.2d 1123, 1125 (Utah Ct. App. 1990) ("When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in the light of its background and history, and also to the effect it will have in practical application.") (quoting Davis, 341 P.2d at 209). "The purpose and intent of Utah's Mechanics' Lien Act manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement," Sill v. Hart, 162 P.3d 1099, 1102-03 (Utah 2007) (citations and quotation marks omitted), and "[l]ien statutes should be broadly construed to effectuate that purpose." Id. at 1103 (citation and quotation marks omitted).

Reading section 38-1-3 through this lens, there can be little question that the statute's current language, which covers the "improvement *to* any premises *in any manner*," Utah Code Ann. § 38-1-3 (emphasis added), is broad enough to include improvements not literally performed *on* those premises but performed adjacent thereto for the benefit of such premises and at the request of the owner of the premises.[9] See John Wagner, 797 P.2d at 1125-26 (noting that, under Utah's mechanics' lien law, "the owner of the premises, at whose instance and for whose benefit the improvement is made, has been the one most likely to suffer loss") (citation

[9] As Plaintiff has argued, its lien only attaches to Braffits Creek's ownership interest in the property liened, and is therefore consistent with the requirement that it "shall attach only to such interest as the owner may have in the property." Utah Code Ann. § 38-1-3.

omitted).[10]

This appears to be a matter of first impression in Utah. However, the Supreme Court has previously affirmed the lienability of work done largely, though not entirely, on property other than the property liened. In First of Denver Mortgage Investors v. C.N. Zundel & Assocs., 600 P.2d 521 (Utah 1979), the court upheld the determination that the mechanics' liens held by those who "performed labor or furnished materials on various condominium units on the property" related back to the work done by one Child Brothers, Inc. ("Child Bros."), which "consisted of locating existing lines and putting in pipeline, water and sewer systems, and storm drains." Id. at 523. In rejecting the plaintiffs' argument that the subsequent liens, "which relate[d] to specific structures," could not "relate back to the date of the commencement of Child Bros.' work," which the plaintiffs "characterize[d] . . . as 'off-site improvements,'" id. at 524, the court explained:

> "The purpose of the lien statutes is to protect those who have added directly to the value of property by performing labor or furnishing materials upon it," Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 187, 341 P.2d 207, 209 (1959). The broad language, "improvement to any premises in any manner," encompasses the instant case where sewer and water systems were installed on the subject property.
>
> It is not necessary to the attachment of a mechanics' lien that the material or labor be furnished solely on a building structure or that the work be performed solely on the lot on which a building is being erected. We agree with the New Jersey Supreme Court, which stated in J. R. Christ Construction Co. v. Willete Assocs., 47 N.J. 473, 221 A.2d 538 (1966), that a contractor should not be barred from

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[10] Regarding the effect "in practical application" of allowing such a lien, John Wagner, 797 P.2d at 1125, the Court has already stated that the foreseeability problems addressed in Davis are not present here, where the owner of the property liened specifically requested the improvements for the benefit of the property liened.

> enjoying the benefits of the mechanics' lien statute where his work not only enhances the value of the developer's land, but is also necessary to make residences to be built on such property habitable. The court held that where a developer engages the contractor to install a sewer system for a subdivision project, the contractor, if he complies with required statutory procedures, is entitled to a mechanics' lien against the developer's property for the cost of labor and materials furnished. The New Jersey Court cited Ladue Contracting Co. v. Land Development Co., 337 S.W.2d 578 (Mo. App. 1960), in emphasizing the fact that water and sewer systems are essential to the comfortable and convenient use of dwellings and that it would be "turn[ing] the clock back to another century" to hold that such improvements are outside the terms of the lien statute. (Id. at 585).

Id. at 524-25.

It is true, as KFI contends, that the facts of Zundel vary significantly from those of the instant case. First, unlike here, in Zundel there was at least *some* work done on the liened property. This was recognized in the court's holding that "[i]t is not necessary to the attachment of a mechanics' lien that the material or labor be furnished *solely* on a building structure or that the work be performed *solely* on the lot on which a building is being erected." 600 P.2d at 525 (emphasis added). In contrast, all of the work on which Plaintiff's lien is based was performed on property other than the property liened.[11] Second, the improvement at issue here–street paving–is not, strictly speaking, like water and sewer systems, which are "necessary to make residences to be built on [the] property habitable." Id.

Although, for these reasons, the instant case does not come within the confines of the

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[11] Plaintiff has shown that the pavement it laid did not precisely follow the road as platted, and argues that its work was therefore done, to some extent, on the private property liened. The Court is not persuaded that the technical deviation from the plat is a material fact, especially considering that "[t]he intent was to amend the plat [to reflect such deviations] after improvements were made." Pl. St. Add. Facts ¶ 12.

Zundel holding, nothing in that case suggests that it represents the outer limits of Utah's mechanics' lien law. On the contrary, the rationale of the Ladue case quoted in Zundel extended, in Ladue itself, to the work of road paving. See 337 S.W.2d at 585 ("It is much too late in these modern times to embrace arguments that the items in [the plaintiff's] account ought not to be treated as essential to the comfortable and convenient use of the dwellings. Research has not discovered any Missouri precedent dealing with streets as subject or not subject to the lien statutes. But *dwellings without streets for ingress and egress*, without driveways, or without efficient sewer systems *are just no longer constructed in urban areas*. To hold that the items of [the plaintiff's] account are outside the terms of the lien statute would be to turn the clock back to another century.") (emphasis added).

Other authorities likewise regard the allowance of liens for offsite water, sewer, and street paving work as sharing the same animating principles. See 53 Am. Jur. 2d Mechanics' Liens § 111 ("*Construction that is essential to the convenient and comfortable use of a city lot is an improvement to the lot*, and is an 'appurtenance' to the lot, even if it is outside the physical boundaries. Thus, liens have been allowed on property for pipes laid in the street for water or gas mains and sewers, as well as sidewalks and street paving, irrespective of whether the fee of the street is in the owner of the abutting lot.") (emphasis added and footnotes omitted); 5-38 Powell on Real Property § 38.14 ("Even if the improvement, such as sidewalks, a sewer line, or street paving, is not directly located on the owner's property, a lien has been recognized in the abutting owner's property that is *directly impacted by these appurtenant improvements*.") (emphasis added and footnote omitted).

Particularly in light of the undisputed facts that 1) the roads paved by Plaintiff were, prior to such paving, "accessible only by foot, on horse, ATV, or four wheel drive truck," Pl. St. Add. Facts ¶ 2, and 2) "[w]ithout the pavement, there was no possibility of the development working financially," Pl. St. Add. Facts ¶ 4, the Court concludes that allowing Plaintiff's lien here is proper. The improvement on which the lien is based not only directly impacted the value of the liened property, but, for the anticipated scale of development on the property, it was also "essential to the comfortable and convenient use of [the property]." Zundel, 600 P.2d at 525.[12]

Finally, the Court distinguishes the only two arguably relevant cases cited by KFI. The first is Brannan Sand & Gravel Co. v. Santa Fe Land & Improv. Co., 332 P.2d 892 (Colo. 1958), in which an individual contracted to have paving done that ran over three separate pieces of property, which were respectively owned by the public, himself, and a third-party. When the subcontractor who performed the work was not paid, he filed a lien on the individual's land for the full value of the work. The trial court allowed the lien, but reduced it to an amount reflecting the value of the portion of the road traversing the individual's property.

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[12] KFI points to evidence that the majority of mountain subdivisions in southern Utah lack paved roads, see KFI Comb. Mem. at 3 (citing Pl. Comb. Mem. Exh. 4, Barnhart Deposition 8:21-22), but it is not clear that the accessibility of those subdivisions is as limited as was the property here prior to Plaintiff's improvements, or that the financial viability of such subdivisions is comparably dependent on improvements like paved roads. In fact, Mr. Barnhart's testimony suggests the reverse; he mentioned the lack of paved roads in most southern Utah mountain subdivisions as part of an attempt to show why the planned development of the property here "was a very high-end development for this area." Pl. Comb. Mem. Exh. 4, Barnhart Deposition 8:13-14. In contrasting the planned development of this property with that of other southern Utah subdivisions, he testified that, in addition to lacking paved roads, "[m]any of the subdivisions in southern Utah don't have water to the lots," and "[a] lot of them don't have electricity and so forth." Pl. Comb. Mem. Exh. 4, Barnhart Deposition 8:24-9:3.

In its combined memorandum, KFI presents Shelby Contracting Co. v. Pizitz, 231 So. 2d 743 (Ala. 1970), in which the Alabama Supreme Court held that an improvement done upon a public street pursuant to a private contract with the owner of the abutting property was not lienable against the abutting property. Little more detail is given about the facts of the case, but again, the law applied clearly varies from that of Utah.

After quoting the applicable statute, which required that the work or materials supporting a lien be provided upon the land liened,[14] the court framed the issue as "whether or not an improvement, such as curbing, paving, or pipe, which is actually upon the street, is to be regarded as being upon the lot which abuts on the street." Id. at 745. After surveying the law from nine other jurisdictions, as well as its own related cases and statutes, the court joined those courts answering this question in the negative. Id. at 750.

Although the cases discussed raised a number of issues, the primary difference the court noted between jurisdictions allowing a lien for work on a sidewalk or street to attach to abutting property and those denying such a lien was that those permitting it held that the owner of the

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[14] As quoted by the court, the relevant statute provided:

> Every mechanic, person, firm, or corporation who shall do or perform any work, or labor *upon*, or furnish any material, fixture, engine, boiler, or machinery for any building or improvement *on land*, or for repairing, altering, or beautifying the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, architect, trustee, contractor, or subcontractor, upon complying with the provisions of this article, shall have a lien therefor *on such building or improvements and on the land on which the same is situated*, to the extent in ownership of all the right, title, and interest therein of the owner or proprietor . . . .

231 So. 2d at 744 (emphasis added).

abutting property owned a fee interest to the center of the street.[15] The court observed that, by statute in Alabama, acknowledging and recording a plat resulted in "a conveyance in fee simple of such portion of the premises platted as are marked . . . on such plat . . . as donated . . . for any street," and that, while "[i]t is true that upon abandonment of the street, absolute ownership thereof will then finally vest in the owner of abutting lot," id. at 750, unless and until that happened, "the interest of the lot owner in the 'street' is merely the right to enter it and to use it in common with the rest of the public." Id. Hence, "the lot owner's interest in the street, at most, is a contingent expectancy dependent on an event which may never occur. We are of opinion that the better view is that the lot owner's interest in the 'street' does not make the

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[15] The court quoted language referring to such ownership in all but one of the cases cited by the lien claimant there. See 231 So. 2d at 745-46 (quoting Lewis v. Roach Manigan Paving Co., 184 S.W. 680, 681 (Tex. Civ. App. 1916) ("But whatever the rule may be in other states, we are of the opinion that, *as it is settled in this state that a deed to a lot fronting on a public street and calling for such street, or else describing the lot by reference to a plat which shows that the lot abuts upon the street and was laid out with reference thereto, carries with it a fee-simple title to the center of the street*, in the absence of some restriction in the deed, it follows inevitably that an improvement, such as the one in controversy in the present suit, was an improvement upon the entire lot, including that part which fronts upon the street and upon which buildings are erected.") (emphasis added); Leiper & Mills v. Minnig, 86 S.W. 407, 409 (Ark. 1905) ("Now, while the general public have an easement in sidewalks, and while the municipality controls them for the purpose of preserving this easement, yet *the fee, under the law, is in the owner of the land abutting the public streets to the center of the street*, and this ownership is absolute, subject only to the rights of the public to enjoy its easement over it, and to the public power of the municipality, as the agent of the public, to preserve this easement or highway.") (emphasis added); Ladue Contracting Co. v. Land Development Co., 337 S.W.2d 578, 583 (Mo. Ct. App. 1960) ("*Appellant owned the land to the center of the street* on which his property abutted, subject to the easement in favor of the public.") (emphasis added and citation and quotation marks omitted)). The sole exception was Application of Bradwood Realty, Inc., 251 N.Y.S.2d 315 (N.Y. Sup. Ct. 1964), but the Shelby court categorized it with the others, apparently inferring that Bradwood was based on the same rationale as the others because Bradwood "quoted at length from the Ladue opinion." 231 So. 2d 746.

'street' a part of the abutting lot so that an improvement on the 'street' is an improvement on the lot so as to make the lot subject to a lien for such improvement." Id.

Concededly, if the Court were required to answer the question posed in Shelby–namely, "whether or not an improvement, such as curbing, paving, or pipe, which is actually upon the street, is to be regarded as being upon the lot which abuts on the street," id. at 745–the Court would likely be compelled to reach the same conclusion reached there. As previously noted, Utah Code section 17-27a-607(1) provides: "Plats, when made, acknowledged, and recorded according to the procedures specified in this part, operate as a dedication of all streets and other public places, and vest the fee of those parcels of land in the county for the public for the uses named or intended in those plats." Additionally, as KFI points out, Utah law, like Alabama's, "holds that an abutting owner owns, at best, a 'reversionary interest' in a street," which interest is contingent and conditional[.]" KFI Comb. Mem. at 11 (citing Ash v. State, 572 P.2d 1374, 1378 (Utah 1977) ("It should be observed that an abutting owner would own a reversionary interest in the street to its center. When the state took the property in fee simple, it would also be expected to take this reversionary interest . . . ."); White v. Salt Lake City, 239 P.2d 210, 213 (Utah 1952) ("[Upon dedication,] the county or city authorities are vested with the fee in the streets. Such ownership carries with it the right to use it for the enumerated purposes when, in their discretion, it bests serves the public interest. If the street should cease to serve any public interest, it may be abandoned and, in that case, the right to the use and control of the roadway would revert to the abutting owner . . . .")). It may therefore not reasonably be concluded, under Utah law, that any part of the street is an extension of the abutting owner's property.

However, as previously stated, the current language of section 38-1-3 does not require, for the attachment of a lien, that work performed for the improvement of a lot be performed upon the lot itself. Thus, the question asked and answered in Shelby is, unlike there, not dispositive here.[16] Shelby itself recognizes that the division of authorities on the abutting property question is attributable to variations in the applicable statutory language. See 231 So. 2d at 745. Because the language and purpose of section 38-1-3 support Plaintiff's lien claim, and neither Utah precedents nor those of other states refute it, Plaintiff's motion for partial summary judgment is granted and KFI's summary judgment motion is denied.[17]

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[16] Further, two of the cases excerpted in Shelby that rejected a right to lien abutting property relied, in part, on the fact that the improvements on the street were made pursuant to local law and were therefore for a public benefit rather than a public one. See Coenen & Mentzer v. Staub, 36 N.W. 877, 877 (Iowa 1888) ("[N]or was [the sidewalk] made for the benefit of the owner, but of the public, and was constructed by the owner, as we presume, in obedience to some requirement of the town government."); Seeman v. Schultze, 28 S.E. 378, 379 (Ga. 1897) ("Paving the sidewalk is an improvement to the public street and facilitates the passage of pedestrians in front of the lot, but it cannot be said in law that it improves the real estate. It is made as much or more for the benefit of the public than it is for the benefit of the owner of the lot. . . . Paving is usually regulated largely by the municipal government. It either paves the sidewalk or requires the owner of the lot to do so."). Presumably, the Shelby court included these excerpts in its decision because it considered this reasoning relevant to the matter before it. In this case, this factor weighs in the other direction. Braffits Creek had the paving done for its own benefit. Iron County did not request that it be done and took no part in getting it done.

[17] KFI has also argued that Plaintiff's only remedies are a claim against Braffits Creek under Utah Code section 14-2-2(1) for failure to obtain a payment bond, and a contract claim against Omnia, both of which remedies Plaintiff has already obtained by virtue of the default judgments entered against Braffits Creek and Omnia in this case. This argument is rejected. KFI has not cited any authority establishing that Plaintiffs' right to the paper remedies it has obtained by default judgment disqualify it for the security provided by a mechanics' lien. KFI has also sought an award of attorney fees pursuant to Utah Code section 38-1-18. Given the Court's decision to allow Plaintiff's lien, KFI is not entitled to its attorney fees under the section cited. Lastly, it is noted that, at oral argument, Plaintiff withdrew an objection it had previously made

ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. A-T Asphalt Paving, Inc.'s Motion for Partial Summary Judgment is granted; and

2. Kennedy Funding, Inc.'s Motion for Summary Judgment is denied.

Dated this 22 day of September, 2009.

BY THE COURT:

John J. Walton
District Court Judge

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to KFI's standing in this matter.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080500072 by the method and on the date specified.

MAIL: LEWIS P REECE 912 W 1600 S BLDG B STE 200 ST GEORGE, UT 84770
MAIL: BRADLEY M STRASSBERG 257 E 200 SOUTH STE 700 SALT LAKE CITY UT 84111

Date: 9/22/09

Deputy Court Clerk

Section

38–1–7 Notice of claim—Contents—Recording—Service on owner of property
38–1–8 Liens on several separate properties in one claim
38–1–9 Notice imparted by record
38–1–10 Laborers and materialmen s lien on equal footing regardless of time of filing
38–1–11 Enforcement—Time for—Lis pendens—Action for debt not affected—Instructions and form affidavit and motion
38–1–12 Repealed
38–1–13 Parties—Joinder—Intervention
38–1–14 Decree—Order of satisfaction
38–1–15 Sale—Redemption—Disposition of proceeds
38–1–16 Deficiency judgment
38–1–17 Costs—Apportionment—Costs and attorneys' fee to subcontractor
38–1–18 Attorneys' fees—Offer of judgment
38–1–19 Payment by owner to contractor—Subcontractor's lien not affected
38–1–20 When contract price not payable in cash—Notice
38–1–21 Advance payments—Effect on subcontractor's lien
38–1–22 Advance payments under terms of contract—Effect on liens
38–1–23 Creditors cannot reach materials furnished, except for purchase price
38–1–24 Cancellation of record—Penalty
38–1–25 Abuse of lien right—Penalty
38–1–26 Assignment of lien
38–1–27 Preliminary notice to original contractor—Form and contents—Service—Notice of commencement of project or improvement
38–1–27 Construction notice registry—Form and contents of notice of commencement, preliminary notice, and notice of completion
38–1–27 2 Notice to subcontractor
38–1–28 Notice of release of lien and substitution of alternate security
38–1–29 No waiver of rights
38–1–30 Third party contract—Designated agent
38–1–31 Building permit—Construction—Notice registry—Notice of commencement of work
38–1–32 Preliminary notice—Subcontractor or supplier
38–1–33 Notice of completion
38–1–34 Abuse of database—Penalty
38–1–35 State not liable
38–1–36 Construction notice does not impart notice
38–1–37 Application of Section 38–1–27 and Sections 38–1–30 through 38–1–36
38–1–38 Lien notification

Law Review and Journal Commentaries

Creer, A Brief Overview of Utah's Mechanic's Lien Law, 12 Utah B J 32 (March 1999)

Homer and Burns, Utah Construction Law Recovery for Nonpayment, 9 Utah B J 8 (May 1996)

Cannon, Extraordinary Collection Procedures–Part I, 6 Utah B J 13 (June/July 1993)

§ 38–1–1. Public buildings not subject to act

The provisions of this chapter shall not apply to any public building, structure or improvement

Codifications R S 1898, § 1399, C L 1907, § 1399, C L 1917, § 3751, R S 1933 § 52–1–1, C 1943, § 52–1–1.

Library References

Mechanics' Liens ⇐8, 35 to 52, 79 to 115
Westlaw Key Number Searches 257k8, 257k35 to 257k52, 257k79 to 257k115

C J S Mechanics' Liens §§ 9, 30 to 42, 44 to 47, 95 to 117, 245, 277, 282

Notes of Decisions

Construction and application 1
Original contract 4
Original contractor 3
Owner 2
Sufficiency of evidence 6
Time for filing 5

1. Construction and application

In action by inland marine insurer, as subrogee of insured's rights, against supplier of liquid alum tank, that exploded and damaged the construction, in which supplier claimed to be an insured "subcontractor" under the policy, trial court did not err in refusing to instruct jury that whoever shall do work or furnish materials by contract shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors, in that definition was taken from mechanics' lien statute U C A 1953, 38–1–2 Jacobsen Const Co, Inc v Industrial Indem Co, 1983, 657 P 2d 1325 Insurance ⇐ 3526(1)

2. Owner

Purchasers of property were properly regarded as owners within meaning of lien statute, and inasmuch as their agreement was directly with builder to render service in building of their home, it was an original contract with him, and not a subcontract as builder claimed, so that where contract had been terminated more than 12 months before builder filed action to foreclose mechanic's lien, it was too late for builder to obtain benefit of his claim of lien U C A 1953, 38–1–2, 38–1–11 Roberts v Hansen, 1971, 25 Utah 2d 190, 479 P 2d 345 Mechanics' Liens ⇐ 260(1)

3. Original contractor

Lien claimant will be characterized "original contractor," for purposes of time to sue provisions of mechanic's lien foreclosure statute, regardless of function he performed in particular construction project, so long as his contract was with property owner U C A 1953, 38–1–2, 38–1–11 For-Shor Co v Early, 1992, 828 P 2d 1080 Mechanics' Liens ⇐ 260(1)

Building material supplier who furnished building materials to owner of house on open account was "original contractor" and was entitled to file mechanics' lien within 80 days after last work was performed, and lien filed 62 days after completion was valid as against one who purchased house from owner U C A 1953, 38–1–2 Smith Bros Lumber Co v Johnson, 1967, 19 Utah 2d 107, 426 P 2d 811 Mechanics' Liens ⇐ 83, Mechanics' Liens ⇐ 132(1)

4. Original contract

'Original contract," within meaning of time to sue provisions of mechanic's lien foreclosure statute, is contract between owner and original contractor U C A 1953, 38–1–2, 38–1–11 For-Shor Co v Early, 1992, 828 P 2d 1080 Mechanics' Liens ⇐ 260(1)

5. Time for filing

Untimeliness of subcontractor's lien action is evaluated with reference to original contract, typically, contract between owner and general contractor, under which subcontractor performs pursuant to his subcontract with general contractor U C A 1953, 38–1–2, 38–1–7(1), 38–1–11 For-Shor Co v Early, 1992, 828 P 2d 1080 Mechanics' Liens ⇐ 260(2)

6. Sufficiency of evidence

In action on mechanic's lien filed against property of corporation and others, evidence supported conclusion that plaintiff performed work at the instance of corporation under an express or implied contract, thus, the lien was valid U C A 1953, 38–1–2, 38–1–3 Dugger v Cox, 1977, 564 P 2d 300 Mechanics' Liens ⇐ 281(3)

§ 38–1–3. Those entitled to lien—What may be attached

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like

professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise except as the lien is barred under Section 38-11-107 of the Residence Lien Restriction and Lien Recovery Fund Act. This lien shall attach only to such interest as the owner may have in the property.

Laws 1911, c. 27, § 12; Laws 1973, c. 73, § 1; Laws 1981, c. 170, § 1; Laws 1987, c. 170, § 1; Laws 1994, c. 308, § 3.

Codifications R.S. 1898, §§ 1372, 1381, 1382, 1397; C.L. 1907, §§ 1372, 1381, 1397, C.L. 1917, §§ 286, 3722, 3731, 3732, 3747; R.S. 1933, § 52-1-3; C. 1943, § 52-1-3.

Cross References

Liens against residence or owner's interest, restrictions, see § 38-11-107.
Private contractors bonds, see § 14-2-1
Wrongful liens, see § 38-9-2.

Law Review and Journal Commentaries

Creer, A Brief Overview of Utah's Mechanic's Lien Law, 12 Utah B.J. 32 (March 1999).

Library References

Mechanics' Liens ⇐8, 15, 22 to 34, 35 to 54, 79 to 115.
Westlaw Key Number Searches: 257k8; 257k15; 257k22 to 257k34, 257k35 to 257k54; 257k79 to 257k115.

C.J.S. Mechanics' Liens §§ 9, 14 to 48, 95 to 117, 245, 277, 282.

Research References

ALR Library
46 A.L.R.5th 1, Landlord's Liability to Third Party for Repairs Authorized by Tenant.

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